

**IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE**

THHERESA STANBURY and spouse,)
JOHN H. STANBURY,)

Plaintiffs/Appellees,)

VS.)

BRIAN E. BACARDI and HOSPITAL)
CORPORATION OF AMERICA d/b/a)
CENTENNIAL MEDICAL CENTER,)

Defendants/Appellants.)

Davidson Circuit
No. 93C-1265

Appeal No.
01-A-01-9509-CV-00420

FILED

April 26, 1996

Cecil W. Crowson
Appellate Court Clerk

**OPINION
CONCURRING IN PART & DISSENTING IN PART**

I concur with the majority's decision that Theresa Stanbury's lack of informed consent claim is time-barred. However, I have prepared this separate opinion for two reasons. First, the majority has erroneously dismissed Ms. Stanbury's claims regarding advising and performing unnecessary surgery which stand on a footing different from her lack of informed consent claim. Second, it is time to hold unequivocally that the continuing treatment doctrine has been completely subsumed into the discovery rule.

I.

Ms. Stanbury is an assembly line worker at Saturn Corporation in Columbia. In 1991 she developed a corn on the fifth toe of her right foot that caused her discomfort when she was required to stand for ten hours during her shift. A physician removed the corn and recommended that she consult a podiatrist. Accordingly, Ms. Stanbury met with Dr. Brian Bacardi on November 22, 1991. After a cursory examination, Dr. Bacardi recommended a minor

surgical procedure to prevent her fifth toe on her right foot from laying on top of her fourth toe. Dr. Bacardi assured Ms. Stanbury that her recovery time would be short and that her work schedule would not be interrupted.

Ms. Stanbury signed two consent forms prior to her December 11, 1991 surgery. One document on Dr. Bacardi's stationery entitled a "Surgery Informer" contained a brief discussion of the general risks and complications of surgery but did not identify the nature of the surgery Dr. Bacardi planned to perform. The second document was a Centennial Medical Center form entitled "Consent for Operation, Administration of Anesthesia, and Other Procedures." In the space provided for describing the operation to be performed, someone hand wrote: "Bilateral Osteotomy, Bilateral Repair Tailor Bunion, Bilateral Arthroplasty, Bilateral Realignment Digit 4 and 5, Bilateral Removal 5th Toenail." Ms. Stanbury insists that no one explained the nature of these procedures and that she did not know that she had consented to surgical procedures on both her feet or to anything other than the minor procedure Dr. Bacardi had described in his office several weeks earlier.

Dr. Bacardi performed extensive surgery on both feet while Ms. Stanbury was under a general anesthetic. During the mid-afternoon, Ms. Stanbury was released from the hospital in a wheelchair with both feet heavily bandaged. Ms. Stanbury described her feet as "[t]wo big white blobs." When Dr. Bacardi removed the surgical dressing during her first office visit on December 20, 1991, Ms. Stanbury stated that she was in "complete and utter shock" and that she "couldn't believe all that had been done. There were so many stitches and so many things, it was just unbelievable." She also noticed that the fifth toe on her right foot was not touching the floor but rather was sticking straight up in the air.

Ms. Stanbury had four more office visits with Dr. Bacardi between January 10 and March 17, 1992. On April 3, 1992, Dr. Bacardi performed additional surgery to attempt to correct the misalignment of the fifth toe on Ms. Stanbury's right foot. During a post-operative office visit on May 5, 1992, Dr. Bacardi

informed Ms. Stanbury that there was nothing more he could do for her and that it would take approximately one year for her feet to fully heal.

Ms. Stanbury and her husband filed a malpractice action against Dr. Bacardi and Hospital Corporation of America on April 30, 1993. They alleged that Dr. Bacardi had been negligent in advising her to have surgery, in performing the surgery itself, and in providing her with post-operative care. They also asserted that Dr. Bacardi had performed unnecessary surgery, that he had failed to obtain her consent to the surgery he performed on December 11, 1991, that he had ignored her complaints of pain and infection, and that he had falsified his office notes to conceal Ms. Stanbury's real condition. Dr. Bacardi responded by denying wrongdoing and by asserting that all the claims were barred by the statute of limitations.

The trial court directed a verdict for Dr. Bacardi at the close of the plaintiffs' proof on the theories of negligent post-operative care, ignoring Ms. Stanbury's complaints of pain and infection, and intentionally falsifying his office notes. It submitted the issues concerning lack of informed consent, advising and performing unnecessary surgery, and negligently performing the surgery to the jury. During the jury's deliberations, however, the trial court withdrew the claim for negligently performing the surgery from the jury. The jury returned a verdict awarding Ms. Stanbury \$211,000 and Mr. Stanbury \$10,000.

II.

Until December 1974, negligence actions against health care providers, like all other actions for injuries to the person, were required to be filed within one year after the date of the wrongful act that caused the plaintiff's injury. *Albert v. Sherman*, 167 Tenn. 133, 135, 67 S.W.2d 140, 141 (1934); *Bodne v. Austin*, 156 Tenn. 353, 364-65, 2 S.W.2d 100, 103 (1928); Tenn. Code Ann. § 28-304. The two most common exceptions to this rule involved continuing torts and the fraudulent concealment of the injury.¹

¹The facts of this case do not support Ms. Stanbury's claim that Dr. Bacardi fraudulently
(continued...)

The Eastern Section of this court adopted the continuing tort principle in 1938 in a case involving an employee who became disabled by breathing chemical particles in his employer's plant over an extended period of time. Noting that the employer had a duty to protect its employees from breathing these particles, the court held that the employer had committed "one continuous tort, beginning with the employment and ending only at the time of total disability of the employee and the termination of his employment." *Tennessee Eastman Corp. v. Newman*, 22 Tenn. App. 270, 279, 121 S.W.2d 130, 135 (1938). Accordingly, the Eastern Section held that the employee's action against the employer was timely since it was filed within one year of the onset of his disability and the termination of his employment. *Tennessee Eastman Corp. v. Newman*, 22 Tenn. App. at 279, 121 S.W.2d at 135.

Twenty-two years later, the Middle Section of this court extended the continuing tort principle to medical malpractice actions. In a case involving a surgical sponge that was negligently left in a patient's body for ten years, the court held that the statute of limitations would be tolled for the duration of the doctor-patient relationship when the plaintiff proved continuing negligent treatment by the physician. *Frazor v. Osborne*, 57 Tenn. App. 10, 19-20, 414 S.W.2d 118, 122-23 (1966). Accordingly, the continuing tort principle became known as the continuing treatment doctrine in the context of medical malpractice cases.

At about the same time, other victims of malpractice were urging the courts to adopt a discovery rule that would delay the accrual of the cause of action until a plaintiff discovered his or her injury. This court repeatedly declined to depart from the traditional rule that a medical malpractice plaintiff's cause of action accrues on the date that the wrongful act causing the injury occurs. *Clinard v. Pennington*, 59 Tenn. App. 128, 136, 438 S.W.2d 748, 752 (1968); *Hall v. De Saussure*, 41 Tenn. App. 572, 580, 297 S.W.2d 81, 85 (1956).

¹(...continued)

concealed her injury. It was evident to Ms. Stanbury as soon as she regained consciousness that Dr. Bacardi had performed surgery for which she had not consented. There was no way that Dr. Bacardi could have concealed from Ms. Stanbury that he had operated on her left foot in addition to her right foot.

The Tennessee Supreme Court adopted the discovery rule on December 9, 1974, in a medical malpractice case where the continuing treatment doctrine was unavailable because the doctor-patient relationship had terminated approximately three years before suit was filed. The Court held that a cause of action for medical malpractice “accrues and the statute of limitations commences to run when the patient discovers, or in the exercise of reasonable care and diligence for his own health and welfare, should have discovered the resulting injury.” *Teeters v. Currey*, 518 S.W.2d 512, 517 (Tenn. 1974). The Court did not address the relationship between the newly adopted discovery rule and the continuing treatment doctrine. However, Justice Harbison’s separate concurrence implied that the statute of limitations continued to be tolled as long as the doctor-patient relationship continued even if the patient discovered the injury. *Teeters v. Currey*, 518 S.W.2d at 518.

Approximately six months later the General Assembly included the *Teeters v. Currey* discovery rule in the Medical Malpractice Review Board and Claims Act of 1975.² Now codified at Tenn. Code Ann. § 29-26-116(a)(2) (1980), the legislative version of the discovery rule provides that “[i]n the event the alleged injury is not discovered within the said one (1) year period, the period of limitation shall be one (1) year from the date of such discovery.” Thus, the statute of limitations for medical malpractice actions is tolled during the period that the plaintiff has not discovered that a wrong has occurred. *Hoffman v. Hospital Affiliates, Inc.*, 652 S.W.2d 341, 344 (Tenn. 1983). Discovery takes place when the plaintiff is aware of facts sufficient to put a reasonable person on notice that he or she has suffered an injury as a result of wrongful conduct. *Roe v. Jefferson*, 875 S.W.2d 653, 657 (Tenn. 1994). These facts include the occasion, the manner, and the means by which the breach of duty that produced the injury occurred and the identity of the person who breached the duty. *Foster v. Harris*, 633 S.W.2d 304, 305 (Tenn. 1982); *Hathaway v. Middle Tenn. Anesthesiology, P.C.*, 724 S.W.2d 355, 359 (Tenn. Ct. App. 1986).

²Act of May 21, 1975, ch. 299, § 15(a), 1975 Tenn. Pub. Acts 662, 671.

The courts did not address the relationship between the discovery rule and the continuing treatment doctrine until 1986 when the Eastern Section of this court heard an appeal involving the dismissal of a malpractice action for the over prescription of addictive drugs. Even though the patient filed suit within one year after the professional relationship with his physician ended, the Eastern Section held that the continuing treatment doctrine was inapplicable because another physician had informed him more than one year before the suit was filed that he was taking too many drugs. *French v. Fetzer*, C.A. No. 43, slip op. at 3 (Tenn. Ct. App. Feb. 20, 1986). The Tennessee Supreme Court granted the patient's application for permission to appeal and later issued a per curiam opinion affirming the Eastern Section's decision, stating: "we find there is no question but that plaintiff had actual knowledge of his malpractice claim no later than February, 1982 . . . and that the subsequent treatment of plaintiff by defendant was in fact a continuation and did not involve new or different drugs." *French v. Fetzer*, C.A. No. 43, slip op. at 2 (Tenn. June 22, 1987) (per curiam opinion not for publication).

Three years later, the Western Section of this court addressed the relationship between the discovery rule and the continuing tort principle in a case involving an employee who claimed to have been injured by prolonged use of a defective tractor. The Western Section stated

We believe that the "continuous tort" doctrine must be applied in conjunction with the "discovery rule." Thus, in a case involving a continuing tort, the cause of action accrues at the time the professional relationship or course of treatment is terminated unless, under the "discovery rule," the cause of action is deemed to have accrued at a different point in time. A plaintiff is not entitled to a new limitations period to begin with the appearance of each new injury or complication.

Kenton v. United Technology, Shelby Law No. 71, slip op. at 6 (Tenn. Ct. App. March 26, 1990) (no Tenn. R. App. P. 11 application filed). Accordingly, the court held that the employee's suit was barred because he had discovered his injury more than one year before filing suit.

One year later, the Middle Section of this court recognized similar reasoning in a medical malpractice case. The court held that the jury should decide whether “the plaintiff knew of the malpractice for a period prior to suit exceeding the statutory limitations period.” *Higgins v. Estate of Crecraft*, App. No. 01-A-01-9008-CV-00311, slip op. at 13 (Tenn. Ct. App. Feb. 21, 1991) (no Tenn. R. App. P. 11 application filed). The Western Section reached a similar result three months later in a case involving lack of informed consent for hip replacement surgery. *Housh v. Morris*, 818 S.W.2d 39, 43-44 (Tenn. Ct. App. 1991).

Two years later, the Middle Section invoked the continuing treatment rule to save a patient’s cause of action against her psychiatrist from a summary judgment based on the one-year statute of limitations. *Roe v. Jefferson*, App. No. 01-A-01-9212-CV-00476, slip op. at 17 (Tenn. Ct. App. April 16, 1993). The Supreme Court, however, reversed the decision because it found that the patient had discovered the psychiatrist’s wrongful conduct before their professional relationship ceased and more than one year before suit was filed. *Roe v. Jefferson*, 875 S.W.2d at 658. The Western Section applied the *Roe v. Jefferson* holding when it held that a patient’s malpractice action against her psychotherapist accrued when she discovered that the defendant’s conduct was wrong, not when her relationship with the defendant ended. *Clifton v. Bass*, 908 S.W.2d 205, 210 (Tenn. Ct. App. 1995).

The cases decided since 1986 indicate that the continuation of a professional relationship no longer plays a role in determining when a cause of action for professional malpractice accrues. The Tennessee Supreme Court removed any doubt about this when it held that a cause of action for legal malpractice accrues when a client learns of his or her injury and that the injury was caused by the lawyer’s negligence. *Carvell v. Bottoms*, 900 S.W.2d 23, 28 (Tenn. 1995). Accordingly, the Court held that clients must sue their lawyers for malpractice within one year after discovering their injury, even if their lawyer is still representing them. *Carvell v. Bottoms*, 900 S.W.2d at 30.

The rule in both medical and legal malpractice actions is now the same. Notwithstanding the existence of an ongoing professional relationship, a cause of action for professional malpractice accrues and the statute of limitations begins to run when the patient or the client discovers, or reasonably should have discovered, that he or she has been injured by the negligent conduct of his or her lawyer or health care provider. The fact that the lawyer or health care provider continues representing or treating the client or patient will not toll the running of the statute of limitations once the injury has been discovered.

III.

Deciding that Ms. Stanbury's lack of informed consent claims were untimely cannot end our inquiry in this case. Ms. Stanbury also claimed that Dr. Bacardi performed the surgery on her feet in a negligent manner, that he negligently advised her to undergo unnecessary surgery, and that he performed unnecessary surgery on her feet. I will take these claims in turn.

A.

NEGLIGENT PERFORMANCE OF SURGERY

Ms. Stanbury claimed that Dr. Bacardi performed the surgery on her feet in a negligent manner. The trial court declined to grant the doctor's motion for a directed verdict on the issue at the close of Ms. Stanbury's proof; however, it effectively withdrew the issue from the jury after deliberations began when the jury requested clarification of portions of the verdict form.³ While I have serious misgivings about the manner in which the trial court disposed of this issue, the trial court's conduct was, at most, harmless error.

³During its deliberations, the jury sought clarification concerning question three on the verdict form that asked "Did the Defendant, Brian Bacardi, deviate from the recognized standard of care for podiatrists in this community by negligently performing surgical procedures on December 11, 1991, and/or April 3, 1992, on the Plaintiff, Theresa Stanbury?" The trial court agreed with the jury's characterization that this question concerned "the fact that surgery was performed, not how it was performed, not how successful it was." The trial court also instructed the jury that "as far as the operation itself, that's not part of the lawsuit."

Considering the record as a whole, I am unable to find any proof presented by Ms. Stanbury tending to show that Dr. Bacardi performed her surgery in a negligent manner. The only expert testimony remotely addressing this issue was that of Dr. James Rogers, a board certified podiatrist, who testified on Ms. Stanbury's behalf. Dr. Rogers stated that there was a misalignment of the bone where Dr. Bacardi performed the arthroplasty on Ms. Stanbury's right foot that did not exist before the surgery, but he did not opine that the misalignment was caused by Dr. Bacardi's negligent surgical technique.

Dr. Rogers's testimony does not establish that Dr. Bacardi performed the surgery negligently. Finders of fact cannot infer negligence from a bad result. *See, e.g., Johnson v. Lawrence*, 720 S.W.2d 50, 56 (Tenn. Ct. App. 1986); *Redwood v. Raskind*, 49 Tenn. App. 69, 75-76, 350 S.W.2d 414, 417 (1961); *see also* Tenn. Code Ann. § 29-26-115(d)(1980) (the jury in a malpractice action shall be instructed that injury alone does not give rise to a presumption of the defendant's negligence). Thus, in medical malpractice cases, a plaintiff cannot establish a doctor's negligence merely by showing that an operation produced a bad result, *Butler v. Molinski*, 198 Tenn. 124, 133-34, 277 S.W.2d 448, 452 (1955), or even that aggravation followed the doctor's treatment. *Poor Sisters of St. Francis v. Long*, 190 Tenn. 434, 440, 230 S.W.2d 659, 662 (1950).

B.
THE UNNECESSARY SURGERY CLAIMS

Ms. Stanbury also claimed that Dr. Bacardi negligently advised her to undergo surgery for the corn on her right fifth toe and that he also performed unnecessary surgery elsewhere on both of her feet. Dr. Bacardi asserted that these claims, like the informed consent claims, were time-barred because Ms. Stanbury filed suit more than one year after her surgery. Dr. Bacardi's argument is without merit because the running of the statute of limitations with regard to Ms. Stanbury's unnecessary surgery claims involves facts and criteria that are quite different from those involved with the informed consent claims.

The majority has decided to dismiss Ms. Stanbury's unnecessary surgery claims because she "does not rely upon this aspect of the rule" in her brief and because she cited no evidence that she "did not discover or should not reasonably [have] discovered that the surgery was unnecessary at least one year before this suit was filed." I find this reasoning both curious and entirely unpersuasive for three reasons. First, Dr. Bacardi, as the party seeking to dismiss Ms. Stanbury's claims based on the statute of limitations, had the burden of demonstrating that Ms. Stanbury's claims were time-barred. Second, Dr. Bacardi's statute of limitations argument with regard to Ms. Stanbury's unnecessary surgery claims is legally wrong. Third, Ms. Stanbury, as the appellee, is under no obligation to respond to arguments not made by the appellant.

We must deal with this issue head on because the jury's damage award is based on a general verdict that could have been based on its conclusion that Ms. Stanbury had not consented to all the surgery that Dr. Bacardi performed or that Dr. Bacardi had recommended and performed unnecessary surgery or both. Thus, even if Ms. Stanbury's informed consent claims are time-barred, she may still be entitled to recover on the unnecessary surgery claims unless they too are time-barred.

Disposing of the statute of limitations issue with regard to Ms. Stanbury's unnecessary surgery claims requires an understanding of the nature of the claims themselves. Ms. Stanbury claimed that Dr. Bacardi deviated from the standard of care for podiatrists by failing to follow a conservative treatment regime before recommending surgery on both her feet. Given that her chief complaint was pain associated solely with her right fifth toe, she presented expert testimony that Dr. Bacardi should have first attempted to alleviate her symptoms using conservative treatment measures such as shaving the corn, wearing wider shoes, or using shoe padding.

A doctor cannot be held responsible for choosing between two or more recognized courses of treatment. *McPeak v. Vanderbilt Univ. Hosp.*, 33 Tenn. App. 76, 79, 229 S.W.2d 150, 151 (1950). Presuming a careful diagnosis, a doctor's honest mistake in electing to perform surgery is a matter of judgment

upon which a negligence action ordinarily cannot be predicated. *Burnett v. Layman*, 133 Tenn. 323, 328, 181 S.W. 157, 158 (1915). Both of Ms. Stanbury's experts testified, however, that performing surgery on Ms. Stanbury without first attempting more conservative treatments was not a recognized alternative treatment regime. Thus, electing to perform surgery without first attempting more conservative treatments was a deviation from the standard of care for podiatrists and was also prima facie evidence of Dr. Bacardi's malpractice.

The statute of limitations on Ms. Stanbury's unnecessary surgery claims could not have started to run until she discovered or reasonably should have discovered "the occasion, the manner, and the means by which a breach of duty occurred that produced [her] injuries." *Roe v. Jefferson*, 875 S.W.2d at 656. Thus, Ms. Stanbury would have had to discover that her surgery was unnecessary before her cause of action accrued. The fact that Ms. Stanbury was asymptomatic except for the corn on her right fifth toe is not, in and of itself, evidence that the surgery was unnecessary. Since Ms. Stanbury was a lay person, I would find that she did not discover that Dr. Bacardi had performed unnecessary surgery until another competent health care provider informed her that her surgery had been unnecessary.

Thus, unlike the majority who are content to dismiss the entire case on statute of limitations grounds, I would hold that Ms. Stanbury's unnecessary surgery claims were timely. Prior to April 30, 1992 - one year before the filing of the complaint - Ms. Stanbury knew that Dr. Bacardi had performed more surgery than she had consented to and that she had experienced unanticipated complications. She had no reason to know that the surgery that Dr. Bacardi performed on her right fifth toe or elsewhere on either of her feet was unnecessary. Thus, even though the statute of limitations on her informed consent claim had started to run, the statute of limitations on her negligent surgery claims had not.

IV.

I would find that the trial court committed reversible error by submitting Ms. Stanbury's time-barred informed consent claims to the jury. Accordingly, I

would vacate the judgment, but unlike the majority, I would not dismiss Ms. Stanbury's suit in its entirety. Since her unnecessary surgery claims are not time-barred, I would remand them for a new trial on these claims alone. She is not entitled to a second bite at the apple with regard to all the other theories of recovery that either were time-barred or were not proven during the first trial.

WILLIAM C. KOCH, JR., JUDGE